ARUMUGAM PILLAI v. GOVERNMENT OF MALAYSIA

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.J.J.) March 6, 1975]

[Penang — Federal Court Civil Appeal No. 142 of 1973]

Income Tax — Claim for income tax — Application for leave to sign final judgment — Whether taxing ultra vires the Constitution — Federal Constitution, art. 13 — Income Tax Act, 1967, s. 106(3).

This was an appeal against the judgment of Chang Min Tat J. ([1974] 1 M.L.J. 127). Chang Min Tat J. held that the court had to grant the application of the Government to sign final judgment in the claim for income tax and he held further that the provisions in the Income Tax Act, 1967, were not *ultra vires* the Constitution. The appellant appealed.

Held, dismissing the appeal: (1) the effect of the relevant provisions of the Income Tax Act is that on service of a notice of assessment on the person assessed to tax the tax payable under the assessment becomes due and payable, whether or not the person appeals against the assessment, which tax can then be recovered by the Government by civil proceedings as a debt due to the Government and that on such civil proceedings being brought by the Government the court has no power to entertain any plea that the amount of the tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased;

(2) the ground of appeal that the learned judge erred in law on the construction of the term "in accordance with law" in Article 13(1) of the Constitution is untenable. Whenever a competent legislature has enacted a law in the exercise of any of its legislative powers, destroying or otherwise depriving a person of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution.

Cases referred to:-

(1) *Government of Malaysia* v. *D.C.* [1973] 1 M.L.J. 161.

(2) *Comptroller of Inland Revenue* v. *N.P.* [1973] 1 M.L.J. 165

(3) *Sun Mun Tobacco Co. Ltd.* v. *Government of Malaysia* [1973] 2 M.L.J. 163.

(4) *Tinsa Maw Naing* v. *Commissioner of Police, Ranggon & Anor.* [1950] Burma Law Reports 17.

FEDERAL COURT.

Datuk Sri S. P. Seenivasagam (*V. Veerappan* and *K. Chandra* with him) for the appellant.

Zulkifli bin Mohmood (Senior Federal Counsel) for the respondent.

Gill C.J.: This is an appeal by the defendant from an order of Chang Min Tat J. dated August 23, 1973, granting the application of the respondent as plaintiff in the action for leave to sign final judgment for a considerable sum due by the defendant to the respondent for income tax and additional income tax in respect of which notices of assessment had been duly served and demands for payment made.

In granting the plaintiff's application, the learned judge rejected the defendant's objections to the application, holding that in respect of those objections, even if he reneged from his previous decision in *Government of Malaysia* v. *D.C.*[1] and *Comptroller of Inland Revenue* v. *N.P.*,[2] he would nevertheless be bound by the decision of this court in *Sun Man Tobacco Co. Ltd.* v. *Government of Malaysia*[3] which upheld the view that by reason of the operation of section 106(3) of the Income Tax Act, 1967, the court, to put it bluntly, had only one function to perform, and that was to give judgment in favour of the Government.

Mr. Chandra, who appeared for the defendant, conceded that in respect of the objections in the defence as regards incorrect assessment or premature assessment, the learned judge was bound by *Sun Man's case* but he contended that he had raised a constitutional issue in paragraph 10 of the defence as follows:

"The action of the plantiff is inconsistent with Article 13(1) of the Constitution and further avers that the plaintiff has been acting under executive powers and as such the proceedings by the plantiff is ultra vires the Constitution of Malaysia."

Article 13(1) of the Constitution provides that "no person shall be deprived of property save in accordance with the law". On this constitutional issue, the learned judge said in his grounds of decision that he had in a previous judgment followed the decision of the Supreme Court of Burma in *Tinsa Maw Naing* v. *Commissioner of Police Rangoon & Anor.*[4] on the construction of "in accordance with law" and held that "when the Constitution speaks of law, it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature." In the learned judge's view, there could be no doubt that income tax was deprivation of property in accordance with the law and that the Income Tax Act, 1967 was duly enacted by the legislature, so that taxing could not be said to be inconsistent with the Constitution.

The learned judge went on to say that the second limb of the objection, in the form in which it was taken, seemed to him to be attacking something impregnable. The view which he took was that where the executive was entrusted with powers conferred on it by enactments duly passed by Parliament, it had to perform executive duties in accordance with its function of governing, and that would mean to exercise the "executive powers" conferred on it. Taxing therefore could not be *ultra vires* the Constitution, so long as it was in accordance with law.

The learned judge concluded that to attack the assessment on the constitutional issue was to say basically that the assessment was "excessive, incorrectly assessed, under appeal or incorrectly increased" which would be caught by section 106(3) of the Act. In the result, he dismissed the objection on the constitutional issue and granted the application to sign final judgment.

Subsequently counsel for the defendant applied for further arguments to be heard on the matter in open court. The learned judge's first reaction was to deny the application, but he thought that he would not deprive himself of the pleasure of hearing further arguments. When the matter came up for hearing in open court, counsel for the plaintiff applied for an adjournment for two weeks on the ground that no lawyer from his department was free to argue the case. The learned judge refused the application for adjournment, and then decided to dispense with further arguments and issued a certificate accordingly to enable the matter to be brought to this court on appeal without leave.

The arguments before us in support of this appeal are not very different from the objections which were raised before the learned trial judge to the granting

of leave to sign final judgment. It is said that the learned judge ought to have held that there was a triable issue in this case and given unconditional leave to defend. It is further said that the learned judge ought not to have acceded to the application to sign final judgment, as the appellant had shown a good defence on the merits. It is next said that the procedure under O.14 of the Rules of the Supreme Court for leave to sign final judgment could not be applied here, as the amounts claimed by the plaintiff were not final and conclusive.

I do not think there is any merit in any of the above arguments. To my mind, the learned judge did not err in law in holding that section 106(3) of the Income Tax Act, 1967 prevented him from entertaining the defence set up by the appellant. In this connection I need say no more than to reiterate what I said in *Sun Man's* case, namely, that there is a string of decided cases in which it has been held that the effect of the relevant provisions of the Income Tax Act is that on the service of a notice of assessment on the person assessed the tax payable under the assessment becomes due and payable at the place specified in the notice, whether or not the person appeals against the assessment, which can then be recovered by the Government by civil proceedings as a debt due to the Government, and that on such civil proceedings being brought by the Government the court has no power to entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased. Nothing which has been said by learned counsel for the appellant in this appeal would justify my entertaining any doubt as to the correctness of what I said in that case.

The major ground of appeal is that the learned judge erred in law on the construction of the term "in accordance with law" in Article 13(1) of the Constitution of Malaysia. In my judgment this ground is equally untenable. So far as the power of taxation is concerned, the Constitution recognizes no fundamental right to immunity from taxation and that is presumably the reason why no constitutional protection is provided against the exercise of that power. Taxation is an independent power of the State. The result is that whenever a competent Legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be. There is indeed nothing arbitrary about imposing income tax for the purpose of raising revenue. It is contended for the appellant that he does not complain about taxation as such but about the method of recovery of such tax. So long as the method of recovery is laid down by the law, I do not see how it can be challenged. Indeed, the law does provide for an appeal against taxation to a separate tribunal from which there is further right of appeal to the High Court by way of a case stated.

I would dismiss this appeal with costs.

Ong Hock Sim and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Datuk S. P. Seenivasagam & Co.*

DIRECTOR-GENERAL OF INLAND REVENUE v. L.T.S.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Wan Suleiman F.JJ.) March 6, 1975]

[Penang — Federal Court Civil Appeal No. 64 of 1974]

Income Tax — Outgoings and expenses wholly and exclusively incurred in production of income — Taxpayer transferee of permit holders for extraction of timber — Assignment of permit illegal — Royalties paid to State Government for extraction of timber — Whether deductible — Income Tax Act, 1967, ss. 33 and 39.

This was an appeal from the decision of Chang Min Tat J. ([1974] 1 M.L.J. 187). The respondent in this case was a transferee of the permit holders for the extraction of timber. Chang Min Tat J. held that although the purported assignments of the permit were illegal and unenforceable, the respondent was entitled to deduct the sums paid by him as royalties to the Government of Kedah on behalf of the permit holders as his outgoings and expenses wholly and exclusively incurred for the production of the income. The Director-General of Inland Revenue appealed and it was contended that as the royalties were not payable by the respondent, he was not entitled to claim deduction in respect of the payments.

Held, dismissing the appeal: as it was not in dispute that the respondent in fact paid the royalties out of his gross income from the timber extracted under his agreements with the permit holders and as they were in fact paid to the State Government they were not caught by section 39(1)(g) of the Income Tax Act, 1967, and were therefore deductible.

FEDERAL COURT.

Mohammad bin Haji Said (Federal Counsel) for the appellant.

Tan Phock Kin for the respondent.

Gill C.J.: The respondent is a timber merchant carrying on business under the firm name of Guan Lee of which he is the sole proprietor. In 1968 he obtained from the Government of Kedah a permit to extract timber from a forest area in the State. In the same year, two other persons named Encik Ismail bin Mohamed Noor and Encik Mahmood bin Haji Abdullah (hereinafter referred to as the "permit-holders") also obtained similar permits. Condition 1 of the permits issued to them stipulated that the permit-holder shall not transfer any of his rights, obligations or liabilities under the permit to any other person or persons by power of attorney or in any other manner, except with the permission in writing of the State Forest Officer.

By agreements dated May 19, 1968 the permit-holders agreed and undertook to "sub-contract" out the forest lands comprised in their respective permits to the respondent, together with the right to collect, extract and take delivery of timber therefrom. In return the respondent agreed to pay the permit-holders $1 for every ton of timber extracted. Under further agreement dated May 26, 1968 the respondent agreed to pay on behalf of the permit-holders all royalties, premiums and any fines which might be imposed by the Forest Department. During the basis year for the year of assessment 1970, the respondent paid the permit-holders a total sum of $5.586 by way of commission, and he paid the Government of Kedah, in the names of the permit-holders, the sums of $36.600 and $42.000 respectively as royalties. In computing the respondent's adjusted income for that year of assessment, the Director-General of Inland Revenue (the appellant) disallowed those sums as items of expenditure.